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Chung Shan Kwang v Ise Ichi Japanese Restaurant Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R2–12–280 OF 2002
FAIZA TAMBY CHIK J
B 8 JANUARY 2003

Civil Procedure — Appeal — Fact, finding of — Judicial appreciation of evidence — Audio visual advantage rule — Whether the appellate court should be slow to disturb findings of trial court

C *Contract — Consideration — Indemnity clause — Whether void for want of consideration*

Contract — Damages — Claim for rental — Whether proof of actual damages required

D *Contract — Privity — Whether appellant not privy to original tenancy agreement could claim benefit of terms in agreement — Whether the was valid assignment of original tenancy to appellant*

Evidence — Adverse inference — Failure to call material witness — Inference that evidence given by such witness would be unfavourable — Evidence Act 1950 s 114(g)

E On 17 June 1997 by way of a tenancy agreement in writing (P3) entered into between Yusoff bin Mohd ('the former owner') and the first respondent, the former owner agreed to let to the first respondent premises known as Unit 2–7–5, Menara Bukit Ceylon, Jalan Ceylon, 50200 Kuala Lumpur ('the said premises') at an agreed rental of sum of RM3,500 per month. On 22 August 1997 a sale and purchase agreement in writing ('P1') was entered into between the
F former owner as the vendor and the appellant as the purchaser in respect of the sale and purchase of the said premises. On 3 December 1997, a deed of assignment in writing ('P2') was entered into between the former owner as assignor and the appellant as assignee, whereby the former owner allegedly assigned all his rights, title, interest, benefits and obligations in the said premises to the appellant. The appellant referring to and relying on P3, P1 and P2
G claimed against the first and/or second respondents in the sessions court for *inter alia* :(a) the sum of RM14,000 being outstanding rental; (b) liquidated damages of RM28,000; and (c) interest and costs. The respondents denied the appellant's claim and the first respondent pleaded a set-off and counterclaimed the sum of RM5,250 being the security deposit and utilities
H deposit on the ground *inter alia*; (i) P3 was entered into and executed between the former owner as landlord and the first respondent as tenant and does not involve the appellant at all; (ii) clause 9 of P3 does not bind the second respondent as it is unsupported by any consideration at all; (iii) in any event clause 9 of P3 does not constitute a valid and binding guarantee/indemnity between the second respondent and the appellant at all and is void as against
I the second respondent for want of consideration; (iv) the respondents have no knowledge of and are not parties to P1 and P2 entered into and executed between the former owner and the appellant at all and the respondents are

not bound by P2; and (v) the rights, title, interests, benefits, obligations and liabilities in respect of P3 was not validly assigned from the former owner to the appellant. The learned sessions court judge found for the defendants ('respondents') dismissing the plaintiff's ('appellant') claim with costs and allowing the first respondent's counterclaim as prayed. Hence this appeal was filed by the appellant.

Held, dismissing the appeal with costs:

(1) It is trite law that the appellant who is not privy nor a party to P3 could not claim the benefit of any of the terms in P3 nor reply on P3 in its claim against the first and/or second respondents unless the rights, title, interests, benefits and obligations in P3 have been expressly and validly assigned from the former owner to the appellant (see para 9).

(2) It is abundantly clear that what was assigned by way of P2 were the rights, title, interests, benefits and obligations under and in the principal sale and purchase agreement entered into between Desa Istimewa Sdn Bhd as proprietor, Lim-Siah Development Sdn Bhd as developer and Marvel Master (M) Sdn Bhd as first owner, in respect of the said premises. And nothing else. In the circumstances, it is observed that at all material times there was and is in fact and in law no valid assignment by way of P2 of the rights, title, interests, benefits and obligations in P3 from the former owner to the appellant in respect of the said premises. In short P3 was not assigned to the appellant at all (see para 11).

(3) Clause 9 of P3 is not a valid indemnity clause due to want of consideration moving from the landlord (the former owner) to the second respondent and is therefore void (see para 13).

(4) The appellant failed to adduce any evidence as to why he is entitled to rental for the months of August, September and October 1998 of sum of RM10,500 and also failed to prove that he has suffered damage/loss to the extent of the sum of RM28,000 nor any other sum or sums at all. It is trite law that damages must be strictly proven (see para 17).

(5) It is clear that in the absence of a valid assignment of the benefits of P3 from the former owner to the appellant by way of P2, there is only a month to month tenancy in existence up to date of respondents delivery of vacant possession of the said premises to the appellant (see para 23).

(6) In the lights of the pleadings filed, evidence adduced and having considered the facts, the issues and principles of law raised in the submissions and reply and having the full benefit of seeing and hearing all the witnesses during examination in chief, cross-examination and re-examination, the learned sessions court judge had correctly arrived at her decision to dismiss the appellant's claim with costs and to allow the first respondent's counterclaim with interest and costs. This court should be slow to disturb the findings of the learned sessions court judge (see para 26).

[**Bahasa Malaysia summary**

Pada 17 Jun 1997 melalui satu perjanjian penyewaan secara bertulis ('P3') di antara Yusoff bin Mohd ('pemilik asal') dan responden pertama, pemilik asal telah bersetuju untuk menyewakan kepada responden pertama premis yang dikenali sebagai Unit 2-7-5, Menara Bukit Ceylon, Jalan Ceylon, 50200 Kuala Lumpur ('premis tersebut') pada jumlah sewa yang dipersetujui berjumlah RM3,500 sebulan. Pada 22 Ogos 1997, satu perjanjian jual beli secara bertulis ('P1') dimasuki antara pemilik asal sebagai penjual dan perayu sebagai pembeli berkaitan jual beli premis tersebut. Pada 3 Disember 1997, satu suratikatan penyerahhakan secara bertulis ('P2') dimasuki antara pemilik asal sebagai penyerahhak dan perayu sebagai pemegang serahhak, yang mana pemilik asal telah menyerahhak semua hak, hak milik, kepentingan, faedah dan tanggungjawab beliau ke atas premis tersebut kepada perayu. Perayu merujuk dan bergantung kepada P3, P1 dan P2 menuntut terhadap responden pertama dan kedua di mahkamah sesyen untuk antara lain: (a) jumlah RM14,000 iaitu baki sewa tertunggak; (b) ganti rugi jumlah tertentu berjumlah RM28,000; dan (c) faedah dan kos. Responden-responden menafikan tuntutan perayu dan responden pertama memplidkan satu tolakan dan tuntutan balas berjumlah RM5,250 iaitu deposit jaminan dan deposit utiliti atas alasan, antara lain: (i) P3 dimasuki dan disempurnakan antara pemilik asal sebagai tuanpunya tanah dan responden pertama sebagai penyewa dan tidak melibatkan perayu langsung; (ii) fasal 9 kepada P3 tidak mengikat responden kedua keran ia tidak disokong oleh apa-apa balasan; (iii) sekiranya fasal 9 kepada P3 tidak membentuk indemniti/jaminan yang sah dan mengikat antara responden kedua dan perayu dan tidak sah terhadap responden kedua kerana tiada balasan; (iv) responden-responden tidak mempunyai pengetahuan dan bukan pihak-pihak kepada P1 dan P2 yang dimasuki dan disempurnakan antara pemilik asal dan perayu dan responden-responden tidak terikat oleh P2; dan (v) hak, hak milik, kepentingan, faedah, tanggungjawab dan liabiliti berkaitan P3 tidak diserahhkkan secara sah dari pemilik asal kepada perayu. Hakim mahkamah sesyen memihak kepada defendan-defendan ('responden-responden') dengan menolak tuntutan plaintif ('perayu') dengan kos dan membenarkan tuntutan balas responden pertama seperti dipohon. Justeru itu, rayuan ini telah difailkan oleh perayu.

Diputuskan, menolak rayuan dengan kos:

(1) Adalah undang-undang mantap bahawa perayu yang bukan privy mahupun pihak kepada P3 tidak boleh menuntut faedah apa-apa terma dalam P3 mahupun menjawab tentang P3 dalam tuntutannya terhadap responden-responden pertama atau kedua kecuali hak, hak milik, kepentingan, faedah dan tanggungjawab dalam P3 dengan jelas dinyatakan dan secara sah diserahhakkan dari pemilik asal kepada perayu (lihat perenggan 9).

(2) Amat jelas bahawa apa yang diserahhakkan melalui P2 adalah hak, hak milik, kepentingan, faedah dan tanggungjawab di bawah dan dalam

perjanjian utama jual beli yang dimasuki antara Desa Istimewa Sdn Bhd sebagai tuan punya, Lim-Siah Development Sdn Bhd sebagai pemaju dan Marvel Master (M) Sdn Bhd sebagai pemilik pertama, berkaitan premis tersebut. Itu sahaja. Dalam keadaan ini, diteliti bahawa pada setiap masa matan dan berdasarkan fakta dan undang-undang, tidak wujud penyerahan yang sah melalui P2 berhubung hak, hak milik, kepentingan, faedah dan tanggungjawab dalam P3 daripada pemilik asal kepada perayu berhubung premis tersebut. Pendek kata, P3 tidak diserahhakan kepada perayu langsung (lihat perenggan 11).

(3) Fasal 9 kepada P3 bukan satu fasal indemnity yang sah kerana memerlukan balasan daripada tuanpunya tanah (pemilik asal) kepada responden kedua dan oleh itu adalah tidak sah (lihat perenggan 13).

(4) Perayu gagal untuk mengemukakan apa-apa keterangan kenapa beliau berhak mendapat sewa untuk bulan Ogos, September dan Oktober 1998 berjumlah RM10,500 dan juga gagal untuk membuktikan bahawa beliau mengalami kerugian/kehilangan yang berjumlah RM28,000 mahupun apa-apa jumlah lain. Adalah undang-undang mantap bahawa kerugian hendaklah dibuktikan dengan nyata (lihat perenggan 17).

(5) Adalah jelas dengan ketiadaan penyerahhakan sah faedah P3 daripada pemilik asal kepada perayu melalui P2, hanya wujud penyewaan bulan ke bulan sehingga responden-responden menyerahkan milikan kosong ke atas premis tersebut kepada perayu (lihat perenggan 23).

(6) Berdasarkan pliding yang difailkan, keterangan yang dikemukakan dan setelah meneliti fakta-fakta, isu-isu dan prinsip-prinsip undang-undang yang ditimbulkan dalam hujah dan jawapan balas dan setelah melihat dan mendengar kesemua saksi-saksi semasa pemeriksaan utama dan pemeriksaan semula, hakim mahkamah sesyen dengan betul membuat keputusan untuk menolak tuntutan perayu dengan kos dan membenarkan tuntutan balas responden pertama beserta faedah dan kos. Mahkamah ini tidak sepatutnya campur tangan dengan penemuan hakim mahkamah sesyen (lihat perenggan 26).]

Notes

For cases on adverse inference for failure to call witness, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 116–129.

For cases on consideration generally, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2666–2717.

For cases on damages generally, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2833–3012.

For cases on finding of facts, see 2 *Mallal's Digest* (4 th Ed, 2001 Reissue) paras 729–819.

For cases on privity generally, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4052–4078.

Cases referred to

Borneo Housing Mortgage Finance Bhd v Personal Representatives of the Estate of Lee Lun Wah Maureen & Anor [1994] 1 MLJ 209 (refd)

Chan Yoke Lain (Administrator of the Estate of Chong Yoke Fah, Deceased) v Pacific & Orient Insurance Co Sdn Bhd [1999] 1 MLJ 303 (refd)

Clarke v Edinburgh & District Tramways Co 1919 SC (HL) 35 (refd)

Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and another appeal [1997] 2 MLJ 465 (refd)

Kay Hian & Co (Pte) v Jon Phua Ooi Yong & Ors [1989] 1 MLJ 284 (refd)

Reliance Shipping & Travel Agencies v Low Ban Siong [1996] 2 MLJ 543 (folld)

*Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasa*my [1995] 1 MLJ 817 (folld)

Legislation referred to

Evidence Act 1950 s 114(g)

Appeal from: Summons No 7–52–19436 of 1998 (Sesssions Court, Kuala Lumpur)

Samundeswari (Sng & Co) for the appellant.
LH Chua (LH Chua) for the respondents.

Faiza Tamby Chik J:

[1] At the conclusion of a full trial at the court below, on the 15 April 2002 the learned sessions court judge found for the respondent/defendants ('respondents') dismissing the appellant's/plaintiffs ('appellant') claim with costs and allowing the first respondent counterclaim as prayed. The appellant appeals to this court against the said judgment in dismissing his claim with costs and in allowing the first respondent counterclaim as prayed.

[2] The background of the case is as follows. On 17 June 1997 by way of a tenancy agreement in writing (P3) entered into between Yusoff bin Mohd ('the former owner') and the first respondent, the former owner agreed to let to the first respondent premises known as Unit 2–7–5, Menara Bukit Ceylon, Jalan Ceylon, 50200 Kuala Lumpur ('the said premises') at an agreed rental of sum of RM3,500 per month payable on the seventh day of each month commencing on 1 June 1997 (pp 177–185 of appeal record ('AP')). On 22 August 1997 a sale and purchase agreement in writing ('P1') was entered into between the former owner as vendor and the appellant as purchaser in respect of the sale and purchase of the said premises (pp 155–168 of AP). On 3 December 1997 a deed of assignment in writing ('P2') was entered into between the former owner as assignor and the appellant as assignee, whereby the former owner allegedly assigned all his rights, title, interest, benefits and obligations in the said premises to the appellant (pp 169–176 of AP).

[3] The appellant referring to and relying on P3, P1 and P2 filed a summons and statement of claim and prays judgment against the first and/or second respondents for:

(a) the sum of RM14,000 being outstanding rental;

(b) liquidated damages of RM28,000;

(c) interest on RM42,000 at the rate of 8% per annum from 6 October 1998 till date of full satisfaction;

(d) costs of this action; and

(e) further or other relief as the court may deem fit and proper.

(pp 27–33 of AP).

[4] The respondents denied the appellant's claim and the first respondent pleaded a set-off and counterclaim. The respondents' pleading may be summarised as follows:

(i) P3 was entered into and executed between the former owner as landlord and the first respondent as tenant and does not involve the appellant at all;

(ii) Clause 9 of P3 does not bind the second respondent as it is unsupported by any consideration at all;

(iii) In any event clause 9 of P3 does not constitute a valid and binding guarantee/indemnity between the second respondent and the appellant at all and is void as against the second respondent for want of consideration;

(iv) The respondents have no knowledge of and are not parties to P1 and P2 entered into and executed between the former owner and the appellant at all and the respondents are not bound by P2;

(v) The rights, title, interests, benefits, obligations and liabilities in respect of P3 was not validly assigned from the former owner to the appellant.

[5] On 13 October 1997 by way of letter to first respondent (D9) Ms Saw & Co, Advocates & Solicitors of Suite A, Tingkat 4, Wisma ABBAS, No 91–93, Jalan Tuanku Abdul Rahman, 50100 Kuala Lumpur wrote, only to inform the first respondent that the said premises have been sold to the Appellant and to deal with the 'new owner' — the appellant (p 194 of AR). On 23 October 1997 by way of letter to first respondent (D9) Ms Asas Properties wrote to inform first respondent that the said premises were sold to the appellant and that 'all further rentals are to be forwarded to' the appellant (p 193 of AR). The appellant's records are incorrect and that payment of monthly rental in respect of the said premises were on monthly payment basis and not made pursuant to or in accordance with P3. On or about June, 1998 first respondent

orally informed the appellant of its intention to terminate the monthly tenancy on 30 July 1998 which said termination the appellant accepted unconditionally. Further it was proposed and accepted unconditionally by the appellant that rental for the month of July 1998 of sum of RM33,500 be deducted from the security deposit of sum of RM7,000 and that the balance of security deposit be refunded to first respondent immediately upon delivery of vacant possession together with return of the keys to the said premises. On 24 July 1998 the first respondent vacated from and delivered vacant possession of the said premises together with all the keys to the appellant who accepted the same unconditionally, and that despite repeated demands made for repayment of the full balance of security deposit of sum of RM3,500, the appellant has up to date hereof failed, and omitted so to do. There is also a sum of RM1,750 being utilities deposit paid to the former owner and in the hands of the appellant which said utilities deposit the appellant had wrongfully kept by way of forfeiture without any valid ground nor basis. The appellant's claim for the sum of RM14,000 being rental for the months of July 1998 till October 1998 and made bare allegation of losses suffered amounting to RM28,000. The respondents admitted receipt of letter dated 20 August 2002 from appellant's solicitor ('P7') and have duly replied by way of solicitor's letter dated 9 September 1998 ('D8') (pp 190–191 and 192 respectively of AR). By way of letter 13 August 1998 ('P6') from respondents' solicitor to appellant, the respondents demanded for refund of the said balance of security deposit of RM3,500 and balance of utilities deposit after deducting for the amount of any unpaid water and electricity bills incurred by first respondent (pp 188–289 of AR). The appellant failed, neglected and omitted to refund the said balance of security deposit of RM3,500 and the said utilities deposit of sum of RM 1,750,00 totaling sum of RM5,250 nor any part thereof nor informed the respondents as regards to any unpaid water and/or electricity bills to be paid by first respondent. The first respondent therefore prays judgment against the appellant for:

(a) the sum of RM5,250;

(b) interest of 8% per annum on RM5,250 from 26 August 1998 till date of realisation;

(c) costs of this action; and

(d) further or other relief as the court may deemed fit and proper.

(pp 38–45 of AR).

[6] By way of reply and defence the appellant joins issue with the respondents on their defence and disputes the first respondent's set-off and counterclaim (pp 46–49 of AR).

[7] Upon perusing the pleadings filed by both parties and the documentary and oral evidence adduced, five issues were raised for determination by the court below. They are:

(i) Whether the appellant who is not a party to P3 would claim the benefit of P3 against the respondents?

[8] During cross-examination, PW1 admitted on oath that he is not a party named in P3 and that P3 was entered into between the former owner and the first respondent. It is clear that PW1, by his own admission, is a stranger to P3. On the doctrine privity, *Halsbury Laws of England*, 4th Ed, Vol 9 at para 329 states:

> ...a contract cannot confer rights or impose obligations on strangers to it, that is, persons who are not parties to it.
>
> The parties to a contract are those persons who reach agreement…

[9] In *Borneo Housing Mortgage Finance Bhd v Personal Representatives of the Estate of Lee Lun Wah Maureen & Anor* [1994] 1 MLJ 209, the court in rejecting an argument advanced by solicitor for the second defendant/guarantor 'that the second defendant being deemed by clause 6 of the guarantee to be principal debtor must be entitled to the benefit of any terms in the loan agreement entered into between the plaintiff and the first defendant...', held 'As the second defendant was not privy to the loan agreement, the defendant could not claim the benefit of any of the terms in the loan agreement …' It is trite that the appellant who is not privy nor a party to P3 could not claim the benefit of any of the terms in P3 nor reply on P3 in its claim against the first and/or second respondents unless the rights, title, interests, benefits and obligations in P3 have been expressly and validly assigned from the former owner to the appellant.

(ii) Whether the rights, title, interests, benefits and obligations in P3 were validly assigned by way of P2 from the former owner to the appellant and binding on the first and/or second respondents?

[10] In P2, Recital G and clause 2 are pertinent and read as follows:

> Recital G: The assignor(s) is/are now desirous of assigning all his/her/their rights, title, interests, benefits and obligations under and in the principal sale and purchase agreement and in the said property to the assignee(s) and the assignee(s) is/are desirous of taking the said assignment subject to the terms and conditions hereinafter contained and also subject to the consent of the said developer.

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Clause 2: In amplification and not in derogation of the matters hereinbefore expressed and set forth the parties hereto expressly agree and confirm with each other that subject only to the express terms, conditions and modifications herein contained the assignee(s) shall assume all the

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obligations and shall be entitled to all whatsoever rights, title, interest and benefits imposed upon or vested in the assignor(s) by or under or pursuant to the principal sale and purchase agreement as fully and effectively as if the assignee(s) had been a party to the principal sale and

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purchase agreement and the parties hereto covenant and undertake to do all acts and execute all instruments necessary or expedient for the purpose of effecting the stipulations hereinbefore expressed.

D **[11]** During cross-examination, when P2 was shown to the PW1, PW1 agreed that P3 was not referred to nor stated in P2 at all. Further and in addition, PW1 admitted that both respondents are not parties named in the principal sale and purchase agreement. It is abundantly clear that what was assigned by way of P2 were the rights, title, interests, benefits and obligations under and

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in the principal sale and purchase agreement entered into between Desa Istimewa Sdn Bhd as Proprietor, Lim-Siah Development Sdn Bhd as Developer and Marvel Master (M) Sdn Bhd as first owner, in respect of the said premises. And nothing else. In the circumstances, it is observed that at all material times there was and is in fact and in law no valid assignment by way of P2 of the

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rights, title, interests, benefits and obligations in P3 from the former owner to the appellant in respect of the said premises. In short P3 was not assigned to the appellant at all.

(iii) Whether clause 9 of P3 constitutes a valid and binding indemnity from the second respondent to the appellant?

G **[12]** Clause 9 is worded as follows:

> It is hereby agreed that the individual who execute this agreement for and on behalf of the tenant company shall in his own personal capacity indemnify the landlord against any loss or damage which the landlord may suffer in the event the

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tenant is in breach of this agreement, including any legal costs on a solicitor-client basis for any legal action taken in connection thereof.

[13] I think that clause 9 is not a valid indemnity clause due to want of consideration moving from the landlord ('the former owner') to the second respondent and is therefore void. On the requirement of consideration for a

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contract to be valid, *Halsbury Laws of England*, 4th Ed, Vol 9 at para 309 states:

....Thus a promise which is made without consideration may not be sued upon, for it is merely a bare promise on which no action will lie. In the case of a contract which is divisible into two parts, for only one of which there is valuable consideration, that part only gives rise to cause of action.

[14] As the first respondent is a private limited company, it can only enter into and execute P3 through its officer(s) including its director(s). It is clear that the second respondent signed P3 in his capacity as a director of the first respondent and in any event cannot be made personally liable to the appellant for any breach of P3 by the first respondent at all. It is also clear that the second respondent is not personally named as a party to P3. I think that as clause 9 of P3 is in law and in fact not a valid and binding indemnity from the second respondent to the appellant, the appellant has no cause of action against the second respondent for any alleged breach of P3 by the first respondent. There is no valid nor binding assignment of P3 wherein clause 9 is to be found.

(iv) Whether there was a fixed term tenancy between the appellant and the first respondent?

[15] During cross-examination of PW1, when a question was put to PW1 as to whether there was a tenancy agreement in writing entered into between PW1 and the respondents, PW1 answered in the negative. DW1 was cross-examined by learned counsel for appellant:

Q: Encik Ishigai kata terus bayar sewa. Adakah terus bayar sewa di P3 — terma-terma?

A: Saya terus bayar kerana pada fikiran saya secara am kalau tidak bayar tidak boleh tinggal di situ.

Q: la boleh dikatakan bahawa hanya ada satu perjanjian sewa yang dibenarkan Encik Ishigai tinggal di premis tersebut. Tiada perjanjian lain.

A: Saya tidak fikir mengenai perjanjian tersebut cuma apa yang saya fikirkan saya perlu bayar sewa kerana ketika melakukan tugas saya tidak fikir yang lain.

[16] In re-examination DWI stated on oath that D9 did not at all refer to P3 nor state any terms or conditions of P3. The evidence adduced established that there is no fixed term tenancy entered into between appellant and the first and/or second respondent and that, if at all, only a month to month tenancy was created after the said premises was sold by the former owner to the appellant.

(v) Whether the appellant has proven its claim against the first and second respondents.

[17] The appellant failed to adduce any evidence as to why he is entitled to rental for the months of August, September and October, 1998 of sum of RM10,500 and also failed to prove that he has suffered damage/loss to the

extent of the sum of RM28,000 nor any other sum or sums at all. It is trite law that damages must be strictly proven. In *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817, the Federal Court held, '... a plaintiff who is claiming for actual damages in an action for breach of contract must still prove the actual damages or the reasonable compensation in accordance with the settled principles .... Any failure to prove such damages will result in the refusal of the court to award such damages'.

[18] In *Reliance Shipping & Travel Agencies v Low Ban Siong* [1996] 2 MLJ 543, Siti Norma Yaakob JCA (as she then was) in delivering the judgment of the court held, 'In this case, the measure of damages stated in the agreement was enforceable provided that there was proof ... that they had suffered loss or damage limited to the extent of the quantum of the 'agreed compensation' ....'

[19] In this case the appellant failed to establish his claim for rental for the months of August, September and October 1998 of sum of RM10,500 nor proved that he has suffered damage/loss to the extent of the sum of RM28,000 or any other sum nor sums at all.

[20] On issue (i) the appellant relied on the introductory paragraph in P3, ie 'the landlord which expression shall where the context so admits include in the case of natural person his legal representatives and permitted assigns....' and that the appellant as purchaser of the said premises is the permitted assign. On issue (ii) the appellant relied on Recital F and clause 8.1 in P1 which reads as follows:

Recital F:	The vendor has agreed to sell and the purchaser has agreed to purchase the said property subject to the existing tenancy and free from encumbrances and upon the terms and subject to the conditions herein appearing.
Clause 8.1:	The purchaser shall take over the existing tenancy with effect from the date the balance purchase price is paid over to the vendor's solicitors.

[21] I think at best Recital F and clause 8.1 in P1 are amongst the agreed terms between the former owner and the appellant and could not be binding on the respondents at all. Further Recital F and clause 8.1 does not and could not legally operate as an assignment of the benefits in P3 to the appellant, P1 being the sale and purchase agreement between the former owner and the appellant. If at all, the only effective instrument for a valid assignment of the benefits of P3 from the former owner to the appellant in respect of the said premises is by way of a deed of assignment. It is clear that Recitals F and G and cls 1 and 2 in P2 made no mention of P3 at all but referred to and assigned the rights, title, interests, benefits and obligations under and in the Principal Sale and Purchase Agreement (entered into between Desa Istimewa Sdn Bhd as

proprietor, Lim Siah Development Sdn Bhd as Developer and Marvel Master (M) Sdn Bhd as first owner in respect of the said premises), from the former owner to the appellant. Even if the appellant came within the meaning of 'permitted assigns' in P1 as submitted by learned solicitor for appellant there was and is no valid assignment of the benefits of P3 from the former owner to the appellant by way of P2 nor by way Recital F and clause 8.1 and in P1. If the appellant still insist to rely on P2 as a valid assignment of the benefits of P3 from the former owner to the appellant, then Recital G and clause 2 therein which specifically mentioned the assignment of the rights, title, interest, benefits and obligations under and in the principal sale and purchase agreement in respect of the said premises has no effect as against the respondents.

[22] On issue (iv) the appellant relied on his submission in respect of the above said issues (i), (ii) and (iii) that there is a fixed term tenancy between the appellant and the first respondent in accordance with P3. I am of the view that Recital F and clause 8.1 in PI and Recitals F and G and clauses 1 and 2 in P2 are but agreed terms between the former owner and the appellant and is not and could not be binding on the respondents at all and does not and could not operate as an assignment of the benefits if P3 to the appellant. Therefore there is no valid assignment of the benefits of P3 from the former owner to the appellant by way of Recitals F and G and cls 1 and 2 in P2 nor by way of Recital F and clause 8.1 in P1.

[23] On issue (v) the appellant submitted that in accordance with P3, the appellant is entitled to rental totaling sum of RM42,000 from July 1998 till 30June 1999, inclusive of the unexpired term. It is clear that in the absence of a valid assignment of the benefits of P3 from the former owner to the appellant by way of P2, there is only a month to month tenancy in existence up to date of respondents delivery of vacant possession of the said premises to the appellant. However, the appellant failed to adduce any evidence as to when a new tenant was found for the said premises after the respondents vacated and delivered vacant possession of the said premises at the end of July, 1998. In PW1's evidence in chief, PW1 merely said that the said premises was only tenanted in 1999 and that the appellant suffered losses in the sum of RM42,000. PW1's evidence on this crucial point is vague and highly suspect. Further PW1 failed to call his new tenant to establish the exact date when the said premises was rented out nor produce any tenancy agreement or rental receipts. In this respect I would invoke s 114(g) of the Evidence Act 1950 against the appellant for failing to call his new tenant to give evidence as to the exact date when the said premises was rented out and at what rate of rental. In *Chan Yoke Lain (Administrator of the Estate of Chong Yoke Fah, Deceased) v Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 MLJ 303 at p 308 F–H, Haidar JCA (as he then was) in speaking for the Court of Appeal held:

> Counsel for the appellant also submitted that the learned judge should have invoked s 114(g) of the Evidence Act 1950 against the respondent company for

A not calling David Lim or his clerk that the signature on D2 was not that of the deceased when it was the evidence of PW2 and PW3 that the deceased signed on both Dl and D2 on the same day. The presence of David Lim or his clerk who filled up the proposal forms would have cleared all doubt about the alleged non-signature of the deceased on D2. Not only was David Lim or his clerk not called, neither was any explanation given by the respondent company as to the non availability B of David Lim or his clerk who should be in the best position to give evidence on the signature of D2. The irresistible inference would be that if David Lim or his clerk is called, their evidence would be unfavourable to the respondent company. We are of the opinion that counsel for the appellant was justified on this point but unfortunately, the learned judge thought otherwise and declined to consider and C invoke s 114(g) of the Evidence Act 1950…

[24] It is noted that the appellant alleged that PW1 made a positive assertion in the court below that PW1 has tried to rent out the said premises but failed to do so and that the respondents have failed to prove otherwise. I think the burden of proof is on the appellant and not on the respondents. In *Kay Hian & D Co (Pte) v Jon Phua Ooi Yong & Ors* [1989] 1 MLJ 284 Chan Sek Keong J held:

> ....The general principle is that whoever makes an assertion must prove it ... It is the third defendants ... they are asserting priority. Accordingly, the burden of proof is on them.

E **[25]** It is clear that the appellant has failed to discharge the burden of proof as to when he secured a new tenant for the said premises and at what rate of rent per month in order to establish his claim against the respondents.

[26] More important, I think in the lights of the pleadings filed, evidence adduced and having considered the facts, the issues and principles of law F raised in the submissions and reply and having the full benefit of seeing and hearing all the witnesses during examination in chief, cross-examination and re-examination, the learned sessions court judge had correctly arrived at her decision to dismiss the appellant's claim with costs and to allow the first respondent's counterclaim with interest and costs. I must remind myself that G this court should be slow to disturb the findings of the learned sessions court judge. In *Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and another appeal* [1997] 2 MLJ 465, at 470 Gopal Sri Ram JCA quoted with approval a passage from the speech of Lord Shaw in *Clarke v Edinburgh & District Tramways Co* 1919 SC (HL) 35 at p 36:

H > When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not.

I > …In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put himself, as I now do in this case, the question: am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having

those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[27] It is clear from the pleadings and the evidence adduced and from the issues raised that the learned sessions court judge did not err in fact and in law to dismiss the appellant's claim against the respondents with costs. Again with regards to the learned sessions court judge's decision in allowing in the first respondent's counterclaim, the learned judge did not err in fact and in law in allowing the first respondent's counter with costs.

[28] For these reasons the appellant's appeal is hereby dismissed with costs and the judgment of the court below is hereby upheld.

Appeal dismissed with cost.

Reported by AG Kalidas